

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
EchoStar Satellite Operating Company	)	File No. SAT-STA-20130220-00023
	)	Call Sign: S2232
Application for Special Temporary Authority	)	
Related to Moving the EchoStar 6 Satellite from	)	
the 77° W.L. Orbital Location to the 96.2° W.L.	)	
Orbital Location, and to Operate at the 96.2° W.L.	)	
Orbital Location	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 8, 2013**

**Released: July 9, 2013**

By the Commission:

**I. INTRODUCTION**

1. By this Memorandum Opinion and Order, we deny an application for review filed by Spectrum Five LLC (Spectrum Five) on April 5, 2013. Spectrum Five seeks review of the International Bureau's April 1, 2013, grant of special temporary authority (STA) to EchoStar Satellite Operating Company (ESOC).<sup>1</sup> That grant authorized ESOC for 60 days, commencing April 1, 2013, to operate tracking, telemetry, and command frequencies necessary to move the EchoStar 6 satellite from the 76.8° W.L. orbital location to the 96.2° W.L. orbital location, and to operate at 96.2° W.L. using the 12.2-12.7 GHz (space-to-Earth) and 17.3-17.8 GHz (Earth-to-space) frequency bands. For the reasons stated herein, we affirm the Bureau's decision.

**II. BACKGROUND**

2. In the *Bureau Decision*, the Bureau addressed ESOC's request to operate EchoStar 6 at 96.2° W.L. in order to accommodate the needs of its customer and development partner, SES Satellites (Bermuda) Ltd. (SES Bermuda), which has been authorized by Bermuda to operate a satellite network – known as BERMUDASAT-1 – at 96.2° W.L. pursuant to the United Kingdom (U.K.) filing with the International Telecommunication Union (ITU). ESOC indicated in its application for STA that SES Bermuda intended to use EchoStar 6 at 96.2° W.L. to evaluate and develop commercial service opportunities in the Caribbean, Latin American, and North Atlantic markets outside of the United States. Such opportunities, according to ESOC, include the provision of video programming and other services, such as international maritime services, to consumers in Bermuda and elsewhere.

3. Two parties opposed the request. DIRECTV Enterprises LLC (DIRECTV) raised concerns about the impact of the proposal on the ITU filings under which its established Direct Broadcast

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<sup>1</sup> EchoStar Satellite Operating Company, *Order and Authorization*, DA 13-593 (released Apr. 1, 2013) (*Bureau Decision*).

Satellite (DBS) service at 101° W.L. operates.<sup>2</sup> DIRECTV subsequently concluded an operator-to-operator arrangement with SES Bermuda, and withdrew its opposition.<sup>3</sup> Spectrum Five raised concerns about the proposal's impact on a U.S.-licensed Broadcasting-Satellite Service (BSS) satellite that it plans to operate in the future using 17/24 GHz frequencies at the 95.15° W.L. orbital location. Spectrum Five also raised concerns about the potential impact of ESOC's proposal on an ITU filing in the 12.2-12.7/17.3-17.8 GHz frequency bands made on Spectrum Five's behalf by the Netherlands.<sup>4</sup> The Netherlands Administration also raised concerns related to the same ITU filing.<sup>5</sup> The Government of Bermuda (Bermuda), through its Ministry of Economic Development, filed a letter supporting grant of ESOC's request.<sup>6</sup> Bermuda, noting its longstanding relationship with the United States, emphasized the importance of the 96.2° W.L. orbital location to Bermuda's social and economic development, as the location will result in the first direct service by broadcasting satellite to Bermuda.<sup>7</sup>

4. In the *Bureau Decision*, the Bureau concluded that grant of an STA would serve the public interest because allowing satellite operations at an unused orbit location on a temporary basis would allow the public to receive services that would otherwise not be available.<sup>8</sup> The Bureau also observed that at the 77° W.L. orbital location, the EchoStar 6 satellite was being used only for limited back-up purposes, and with a grant of the STA could be put to use for communications.<sup>9</sup> The Bureau concluded that there were extraordinary circumstances, within the meaning of our rules, for a grant of ESOC's request.<sup>10</sup> It found that, with the completion of an operator-to-operator arrangement between

<sup>2</sup> Letter from William M. Wiltshire, counsel for DIRECTV Enterprises LLC, to Marlene H. Dortch, Secretary, FCC (Feb. 25, 2013). See also letters and notifications of *ex parte* presentations dated March 4, 12, 18, 19, and 21, 2013, from William M. Wiltshire, counsel for DIRECTV Enterprises LLC, to Marlene H. Dortch, Secretary, FCC. The Direct Broadcast Satellite service is the term used in the United States to denote what is identified internationally as the Broadcasting-Satellite Service operating in the 12.2-12.7 GHz (space-to-Earth) and 17.3-17.8 GHz (Earth-to-space) frequency bands.

<sup>3</sup> Letter from William M. Wiltshire, counsel for DIRECTV Enterprises LLC, to Marlene H. Dortch, Secretary, FCC (March 27, 2013). The United States and the U.K. have ratified these arrangements.

<sup>4</sup> Letter from Todd M. Stansbury, counsel for Spectrum Five LLC, to Marlene H. Dortch, Secretary, FCC (March 12, 2013) (*Spectrum Five Opposition*). See also letters and notifications of *ex parte* presentations dated March 20, 28, and 29, and April 1, 2, and 3, 2013 from Todd M. Stansbury, counsel for Spectrum Five LLC, to Marlene H. Dortch, Secretary, FCC.

<sup>5</sup> Letter from R. Agema, Head of the Market Access Department, Radio Communications Agency Netherlands, on behalf of the Minister of Economic Affairs, to Roderick K. Porter, Deputy Chief, FCC International Bureau (Mar. 28, 2013).

<sup>6</sup> Letter from Dr. the Honorable E. Grant Gibbons, JP MP, Minister of Economic Development, Government of Bermuda, to Julius Genachowski, Chairman, FCC (filed April 1, 2013).

<sup>7</sup> *Id.*

<sup>8</sup> *Bureau Decision* at ¶ 9, citing Columbia Communications Corp., *Memorandum Opinion and Order*, 7 FCC Rcd 122, 123, ¶ 16 (1991). See also SES Americom, Inc., *Memorandum Opinion and Order*, 20 FCC Rcd 436, 439-40, ¶ 8 (Int'l Bur., Sat. Div. 2005); PanAmSat Licensee Corp., *Order and Authorization*, 19 FCC Rcd 2012, 2014, ¶ 11 (Int'l Bur., Sat. Div. 2004).

<sup>9</sup> *Bureau Decision* at ¶ 9.

<sup>10</sup> In reaching this conclusion, the Bureau interpreted the term "extraordinary circumstances" in light of the unique features of the Commission's licensing rules, procedures and practices for geostationary satellites. Under ordinary circumstances, geostationary satellites operate and are maintained at regularly authorized orbital locations within the geostationary arc, through the use of propulsion systems ultimately controlled using radio commands. The Bureau viewed a licensee's need to relocate a geostationary satellite, in this context, and in light of the DIRECTV/SES Bermuda operator-to-operator arrangement and certain commitments made by ESOC/SES Bermuda concerning Spectrum Five's U.S. licensed 17/24 BSS satellite, as providing the necessary extraordinary circumstances. The Bureau noted its practice of addressing similar relocation requests through the mechanism of STAs, observing that (continued....)

DIRECTV and SES Bermuda, and, based on ESOC and SES Bermuda's commitments concerning Spectrum Five's U.S.-licensed satellite, the proposed EchoStar 6 operations would have no foreseeable adverse impact on U.S.-licensed operations or related U.S. ITU filings.<sup>11</sup> Furthermore, the Bureau found, based on information provided by ESOC,<sup>12</sup> that no operating satellite would experience harmful interference from EchoStar 6's operations under STA.<sup>13</sup>

5. The Bureau also considered Spectrum Five's argument that ESOC was improperly seeking expedited action so as to permit the U.K., on behalf of SES Bermuda, to "bring into use" the BERMUDASAT-1 filing prior to an ITU deadline of April 14, 2013. The Bureau concluded that motivations of commercial operators related to the ITU process did not provide an appropriate basis for decision-making.<sup>14</sup> In light of the DIRECTV/SES Bermuda operator-to-operator arrangement, the Bureau concluded that delay could place the Commission in the position of resolving, through inaction, a potential dispute between other Administrations concerning the application of the ITU Radio Regulations to their respective filings.<sup>15</sup> In addition, in the course of discussing Spectrum Five and the Netherlands Administrations' concerns with the "perfecting" of the BERMUDASAT-1 filing at the ITU, the Bureau observed that the ITU, rather than the Commission, would need to make any such determinations.<sup>16</sup>

6. Spectrum Five sought a stay of the Bureau action.<sup>17</sup> The Bureau denied that request.<sup>18</sup>

### III. DISCUSSION

7. Spectrum Five claims that the Bureau did not properly address the international coordination process in its analysis. Spectrum Five also contends that the *Bureau Decision* conflicts with statutory and regulatory requirements for granting STAs, and that by granting the STA the Bureau improperly by-passed requirements for public notice and an opportunity to comment. Spectrum Five specifically disagrees with the Bureau's findings of extraordinary circumstances and serious prejudice to the public interest from delay and argues that the grant involved unexplained departures from precedent.<sup>19</sup> Spectrum Five argues that the Bureau's approach resulted in a materially deficient record.<sup>20</sup> Spectrum Five also argues that the *Bureau Decision* will result in harm to the public interest by suppressing

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STAs provide an appropriate short term licensing mechanism to address the transit of a satellite from one location to another. *Bureau Decision* at ¶ 9-10. The ESOC/SES Bermuda commitments relate to future coordination of the BERMUDASAT-1 filing with the USABSN-24 ITU filing associated with Spectrum Five's planned and U.S.-licensed 17/24 GHz BSS satellite at 95.15° W.L. *Id.* at ¶ 13.

<sup>11</sup> *Bureau Decision* at ¶ 10.

<sup>12</sup> ESOC STA Request, Narrative at Exhibit 2.

<sup>13</sup> *Bureau Decision* at ¶ 10, and ¶ 17.

<sup>14</sup> *Id.* at ¶ 8.

<sup>15</sup> *Id.* at ¶ 10.

<sup>16</sup> *Id.* at ¶ 15.

<sup>17</sup> Spectrum Five LLC's Emergency Request for Stay, filed April 5, 2013. *See also* Letter from Todd M. Stansbury, counsel for Spectrum Five LLC, to Marlene H. Dortch, Secretary, FCC (April 18, 2013).

<sup>18</sup> EchoStar Satellite Operating Company, *Memorandum Opinion and Order*, DA 13-854 (released Apr. 23, 2013) (*Bureau Stay Decision*).

<sup>19</sup> Application for Review at 7-12.

<sup>20</sup> Application for Review at 12-14.

competition.<sup>21</sup>

8. As an initial matter, and given the complexity of the arrangements involved in this case, we discuss the basis for the U.S. involvement in the authorization of the EchoStar 6 operations at the 96.2° W.L. orbital location. EchoStar 6 launched, under FCC license, on July 14, 2000. The United States registered the satellite under the United Nations Convention on Registration of Objects Launched into Outer Space.<sup>22</sup> As the Bureau indicated in the *Bureau Decision*, the FCC is the licensing administration of EchoStar 6 for purposes of article 18.1 of the ITU Radio Regulations.<sup>23</sup> As the Bureau also indicated, ESOC, as the licensee of the EchoStar 6 satellite and grantee of the STA, is obligated to maintain operational control of EchoStar 6 at all times, and to ensure that operations are under its ultimate direction and control.<sup>24</sup> ESOC's arrangement with SES Bermuda is, in effect, a satellite capacity leasing arrangement. At the 2012 World Radiocommunication Conference, the ITU recognized that such arrangements could form the basis for bringing into use an ITU filing by an Administration acting on behalf of a such a lessee.<sup>25</sup> Consistent with this approach, the *Bureau Decision* indicated that the FCC will not object to the U.K. Administration notifying the ITU that the BERMUDASAT-1 network was brought into use.<sup>26</sup> The *Bureau Decision* also indicated that the United States would not make a filing on its own behalf in connection with the EchoStar 6 operations,<sup>27</sup> and that the operations authorized are fixed satellite and mobile satellite operations pursuant to section 4.4 of the ITU Radio Regulations, which permits operations on a non-harmful interference basis.<sup>28</sup> We agree with the Bureau's analysis.

9. The Bureau also appropriately considered the potential impact of EchoStar 6 operations on the established services offered by DIRECTV at the 101° W.L. orbital location. The United States and the U.K. have now ratified the operator-to-operator arrangement between DIRECTV and SES Bermuda in this regard. The ratification of this arrangement insures that DIRECTV's established U.S. operations at this orbital location will be fully protected on an ongoing basis. Similarly, the United States and the U.K.

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<sup>21</sup> Application for Review at 14-18.

<sup>22</sup> The document notifying registration is identified in U.N. records as [ST/SG/SER.E/379](#). The United Nations Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, provides in Article 7 that "A State ... on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object."

<sup>23</sup> Article 18.1 of the ITU Radio Regulations provides in relevant part:

No transmitting station may be established or operated by a private person or by any enterprise without a licence issued in an appropriate form and in conformity with the provisions of these Regulations by or on behalf of the government of the country to which the station in question is subject . . . .

See also 47 U.S.C. § 301(a) (licensing required for stations operating "upon any mobile station within the jurisdiction of the United States").

<sup>24</sup> *Bureau Decision* at ¶ 18.

<sup>25</sup> Paragraph 3.2 of the Minutes of the 13<sup>th</sup> Plenary Meeting of WRC-12 (as set out in ITU Circular Letter CR/333).

<sup>26</sup> *Bureau Decision* at ¶ 15.

<sup>27</sup> *Id.*

<sup>28</sup> *Bureau Decision* at ¶ 17. Article 4.4 of the ITU Radio Regulations, provides:

Administrations of the Member States shall not assign to a station any frequency in derogation of either the Table of Frequency Allocations in this Chapter or the other provisions of these Regulations, except on the express condition that such a station, when using such a frequency assignment, shall not cause harmful interference to, and shall not claim protection from harmful interference caused by, a station operating in accordance with the provisions of the Constitution, the Convention and these Regulations.

have also agreed to protection of Spectrum Five's U.S.-licensed satellite at 95° W.L., based on assurances provided by SES Bermuda. Taken together, these Administration-to-Administration agreements provide the United States with protections of operations at orbital locations from which the U.S. public receives service. In contrast, there are no operator-to-operator or Administration-to-Administration agreements in place at this time that would comparably protect such U.S. operations, were the 96.2° W.L. location or nearby locations to be used by a satellite network operating outside these agreements. Accordingly, we conclude that our action today – which, by permitting continued EchoStar 6 operations and thereby providing assurance of U.K.-backed interference protections for service provided to the United States population by U.S.-licensed satellites from nearby orbital locations – will serve the public interest, consistent with U.S. obligations under the ITU treaty documents. Without the grant of the STA, the benefits accruing from the certainty of interference protection could be lost, thereby substantially disserving the public interest.

10. We next address Spectrum Five's claims that the Bureau did not properly take international coordination matters into account in its decision. Spectrum Five makes two such claims. First, Spectrum Five takes issue with a statement in the *Bureau Decision* that "delay could place the Commission in the position of resolving through inaction a potential dispute between other Administrations concerning the application of the ITU Radio Regulations to their respective filings."<sup>29</sup> Spectrum Five argues that, by granting ESOC's STA Request, the Commission effectively made a decision favoring the U.K., because the FCC's action facilitates "bringing into use" the BERMUDASAT-1 filing at the ITU.<sup>30</sup> Second, Spectrum Five argues that a statement in the *Bureau Decision* that the Bureau was taking "no position" regarding the ITU process was arbitrary and capricious because the Bureau must consider this important aspect of the matter.<sup>31</sup>

11. As discussed above, we believe that the actions taken by the Bureau served the public interest by fully protecting orbital locations from which residents of the United States receive service.<sup>32</sup> It is principally on this basis that we affirm the Bureau's decision. Our ruling today does not rest on the Bureau's rationale that "delay could place the Commission in the position of resolving through inaction a potential dispute between other Administrations concerning the application of the ITU Radio Regulations to their respective filings."<sup>33</sup> Accordingly, we need not address Spectrum Five's objection to this argument. We do note, however, that we do not agree with Spectrum Five's assertion that the Bureau's action (and our action today) necessarily requires other Administrations, such as the Netherlands Administration acting on Spectrum Five's behalf, to forever protect the operational parameters of the BERMUDASAT-1 filing in a manner that forecloses other operations. This assertion is simply incorrect as a legal matter. The ITU Radio Regulations provide for cancellation of recorded but unused frequency assignments.<sup>34</sup> Moreover, the *Bureau Stay Decision* specifically noted the possibility for future arrangements, the flexibility available in designing future satellites, and ITU obligations to pursue rational and efficient use of frequencies and orbital locations.<sup>35</sup>

12. With respect to Spectrum Five's claim that the Bureau acted arbitrarily and capriciously, the Bureau explained in considerable detail the approach it planned to take in the ITU process in

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<sup>29</sup> *Bureau Decision* at ¶ 10.

<sup>30</sup> Application for Review at 6, 11-12.

<sup>31</sup> Spectrum Five Reply, filed April 30, 2013, at 5.

<sup>32</sup> See *supra* ¶ 9.

<sup>33</sup> *Bureau Decision* at ¶ 10.

<sup>34</sup> See Appendix 30, Article 5.3.2.

<sup>35</sup> *Bureau Stay Decision* at ¶ 14.

connection with the U.K. and Netherlands filings. That approach involved taking positions on some matters and not on others.<sup>36</sup> The specific matters on which the *Bureau Decision* indicated the FCC would take no position in the ITU process were ones which the Bureau correctly concluded are best addressed by the two Administrations involved, with the assistance of the ITU if necessary.<sup>37</sup> The *Bureau Decision* also appropriately declined to make determinations concerning the “perfecting” of ITU filings of other Administrations, observing correctly that such determinations are for the ITU.<sup>38</sup> Therefore, Spectrum Five’s argument does not provide grounds for overturning the Bureau’s decision.

13. We also conclude that the Bureau’s action was consistent with statutory and regulatory requirements for issuing STAs. Section 309(c)(2)(G) of the Communications Act of 1934, as amended, permits issuance of an STA of up to 60 days duration without public notice and an opportunity for comment.<sup>39</sup> The Bureau’s action here was consistent with this statutory provision. Moreover, its practice did not depart from past practices followed in situations involving a 60-day STA request and a related application for regular authority.<sup>40</sup> We also agree that there were extraordinary circumstances requiring temporary operations and that delay would seriously prejudice the public interest.<sup>41</sup> We make this conclusion keeping in mind the larger international context in which Administration-to-Administration agreements have been concluded, which remove any significant concern about potential interference to other operational satellites or planned U.S.-licensed satellites.<sup>42</sup>

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<sup>36</sup> *Bureau Decision* at ¶ 15. The Bureau indicated it would assume the validity of the BERMUDASAT-1 filings for purposes of the operator-to-operator arrangement reached by DIRECTV and SES Bermuda, but would otherwise take no position in the ITU on the validity or priority of U.K. and Netherlands filings. The Bureau also indicated that the FCC would not object to the U.K. Administration filing with the ITU to bring into use the BERMUDASAT-1 network, but would take no position as to whether that action “perfects” the BERMUDASAT-1 filing.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* See also *Bureau Stay Decision* at ¶ 13 (stating that “issues related to the conformity of the U.K. submissions to the ITU Radio Regulations are matters on which we will express no views”).

<sup>39</sup> 47 U.S.C. § 309(c)(2)(G). See also 47 C.F.R. § 25.120(b)(3).

<sup>40</sup> See *infra*, n. 44 and accompanying text. Under Section 309 (c)(2)(G), an STA may be granted for 60 days if an application for regular operation is contemplated to be filed. ESOC filed an application for regular authority on February 27, 2013, one week after its February 20, 2013, STA request. See IBFS File No. SAT-MOD-20130227-00026. On April 29, 2013, ESOC amended its application in response to the Bureau’s April 26th request for clarification. See File No. SAT-AMD-20130429-00063; Letter from Fern J. Jarmulnek, Acting Chief, Satellite Division, to Pantelis Michalopoulos, Counsel for ESOC, dated April 26, 2013. On May 3, 2013, ESOC’s application was placed on Public Notice. The application for regular authority will be addressed separately.

<sup>41</sup> See 47 C.F.R. § 25.120(b). Our decision today depends on the totality of the circumstances described in this Memorandum Opinion and Order. It is therefore unnecessary for us to decide whether the need to move a satellite to a new orbital location, by itself, is sufficient to constitute an extraordinary circumstance for purposes of Section 25.120(b) of our Rules.

<sup>42</sup> The *Bureau Decision* cited a case involving the DIRECTV 1R satellite as an example of the Bureau’s practice of authorizing relocation by STA. *Bureau Decision* at ¶ 9 and n. 19. As Spectrum Five correctly observes, the *Bureau Decision* cited a file that did not involve the grant of an STA, but instead the grant of regular authority. Application for Review at 9. However, a related file involving the DIRECTV 1R satellite and the same satellite movement did involve an STA grant. Specifically, as with the STA under review in this case and other cases noted *infra* at note 44, the DIRECTV 1R case involved a situation in which the Bureau granted an STA prior to issuing a public notice accepting for filing a related application for a license modification. More specifically, the DIRECTV 1R case involved a sequence of events in which: 1) the Bureau first granted an STA for the transit of the satellite to a new location; 2) the Bureau then, during the transit, provided public notice of the related license modification; 3) after the public notice period closed but prior to action on the license modification, the Bureau granted an STA to maintain the satellite at the new location; and 4) one week later, the Bureau granted a license modification to specify the new location and authorize regular service at that location. DIRECTV Enterprises, LLC, Grant Stamp, File No. (continued....)



14. We do not agree with Spectrum Five's restrictive interpretation of Bureau precedent on the role of such factors as public notice and continuity of service in the STA decision-making process.<sup>43</sup> First, we note that the Bureau has granted STAs for satellite relocations and operations both with and without providing formal public notice.<sup>44</sup> In any event, Spectrum Five had actual notice of ESOC's request and commented multiple times. Furthermore, and as explained in the *Bureau Stay Decision*, the process used in this case did not result in a materially deficient record.<sup>45</sup>

15. Second, on the question of whether an STA can be granted without a showing that it is necessary to ensure continuity of service, Bureau case law clearly does not limit the grant of STAs to this one circumstance.<sup>46</sup> Indeed, Spectrum Five concedes that not only continuity of service but also expansion of service has provided a basis for granting STAs.<sup>47</sup> Nevertheless, Spectrum Five appears to argue that because there is no immediate requirement for service at the 96.2° W.L. location, ESOC has failed to demonstrate any "compelling" public interest benefit of the STA grant.<sup>48</sup> As stated earlier, we believe that the grant of the STA was in the public interest because it enabled the United States to fully protect orbital locations currently providing service to our country. Finally, and critically for purposes of our decision today, we note that Spectrum Five cites no Commission-level precedent that is inconsistent with the Bureau's decision to grant the STA.<sup>49</sup>

16. Another factor adds some weight to the case for the STA. Prior to the *Bureau Decision*, EchoStar 6 operated at the 76.8° W.L. orbital location, and, had it continued to operate there, it would

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SAT-STA-20120817-00138 (granted Aug. 28, 2012), Report No. SAT-00894, DA 12-1424 (August 31, 2012) (drift authority); Report No. SAT-00901 (Sept. 28, 2012) (Public Notice concerning File No. SAT-A/O-20120817-00137); DIRECTV Enterprises, LLC, Grant Stamp, File No. SAT-STA-20121109-00197 (granted Dec. 14, 2012), Report No. SAT-00921, DA 12-2065 (Dec. 21, 2012) (granting authority to maintain DIRECTV 1R at new orbital location); DIRECTV Enterprises, LLC, Grant Stamp, File No. SAT-A/O-20120817-00137, SAT-AMD-20120824-00142, SAT-AMD-20120913-00148 (granted Dec. 21, 2012), Report No. SAT-00923, DA 13-31 (Jan. 11, 2013) (granting regular authority for operations at the new location). To the extent the Bureau's approach in the DIRECTV 1R case differed from its approach in this case, the differences appear reasonable based on the different facts and circumstances, including those related to coordination and pre-existing agreements involving other satellite networks.

<sup>43</sup> See Application for Review at 10.

<sup>44</sup> For cases in which the STA issued prior to issuance of a public notice, or prior to completion of a comment period, see, e.g., IBFS File No. SAT-STA-20120911-00147, public notice of grant, Report No. SAT-00907, DA 12-1727 (October 26, 2012) (Intelsat 5 drift to location where it is proposed to operate under new U.S. filing), and public notice establishing comment deadline for related File No. SAT-MOD-20121109-00196, Report No. SAT-00937 (March 15, 2013); IBFS File No. SAT-STA-20111017-00205, public notice of grant, Report No. SAT-00816, DA 11-1754 (October 21, 2011) (drift of AMC-2 to location specified in Swedish ITU filing), and public notice establishing comment deadline for related File No. SAT-MOD-20111025-00209, Report No. SAT-00824 (November 18, 2011) (AMC-2); IBFS File No. SAT-STA-20100525-00108, public notice of grant, Report No. SAT-00711, DA 10-1436 (July 30, 2010) (drift to and operation of AMC-4 at location specified in Colombian ITU filing), and public notice establishing 30 day comment deadline for related File No. SAT-MOD-20100623-00144, Report No. SAT-00703 (July 2, 2010).

<sup>45</sup> *Bureau Stay Decision* at ¶ 10.

<sup>46</sup> See, e.g., IBFS File No. SAT-STA-20110726-00133, granted Sept. 1, 2011 (in orbit testing for SES-2); IBFS File No. SAT-STA-20110627-00122, granted July 11, 2011 (satellite end-of-life maneuvers).

<sup>47</sup> Application for Review at 10.

<sup>48</sup> Application for Review at 10-11. See also Letter from Todd M. Stansbury, counsel for Spectrum Five, to Marlene H. Dortch, Secretary, dated June 4, 2013, at 2-5.

<sup>49</sup> See *Comcast Corp. v. FCC*, 526 F.3d 763, 770 (D.C. Cir. 2008) ("[U]nchallenged staff decisions are not Commission precedent, and agency decisions contrary to those cannot be deemed arbitrary and capricious.").

have operated as a back-up satellite to a recently launched and fully functional satellite.<sup>50</sup> For such back-up operations, the public interest benefit does not necessarily derive from immediate requirements for service, but from the possibility of service at a future date, and as circumstances develop. On the other hand, ESOC explained that, by relocating the satellite to the 96.2° W.L. location, it is now in a position to develop new markets and provide innovative satellite video distribution services to a diverse array of customers in underserved markets in the Atlantic Ocean region, including Bermuda, the Caribbean, and Latin America, and U.S. and non-U.S. ships and vessels.<sup>51</sup> Thus, the Bureau's action provided for more effective use of an on-orbit satellite, and substantially increased the possibility that the resource will be used for service.<sup>52</sup>

17. We also conclude that Spectrum Five's allegations concerning harms to it and to competition are speculative and based on unsupported assumptions. The *Bureau Stay Decision* discussed these assumptions in detail, and correctly identified why they are speculative and unsupported.<sup>53</sup>

18. In June of 2013, Spectrum Five made numerous ex parte communications following the close of the formal pleading cycle on April 30, 2013.<sup>54</sup> These letters largely repeated arguments and relied on facts previously raised, with two exceptions. First, Spectrum Five makes a new argument that a statement by the Bermuda regulator in a February 20 letter reflects an unauthorized transfer of control from ESOC to SES Bermuda. The letter stated that Bermuda contemplated an arrangement in which telemetry, tracking, and control functions would be under the direction and control of SES Bermuda, but performed by EchoStar from earth stations in the United States.<sup>55</sup> The proper forum for raising concerns regarding whether there has been an unauthorized transfer of control, as Spectrum Five claims, would be a complaint filed with the Enforcement Bureau rather than an application for review of an STA.<sup>56</sup> In any case, the April 1 *Bureau Decision* specifically addressed the issue of control, stating that "ESOC, as the licensee of the EchoStar 6 satellite and grantee of this STA, is obligated to maintain operational control of EchoStar 6 at all times, and to ensure that operations are under its ultimate direction and control. Any contractual arrangements with customers, for example customers leasing satellite capacity, must ensure that this continues to be the case."<sup>57</sup> EchoStar has specifically acknowledged its obligation to maintain ultimate control over the EchoStar 6 satellite.<sup>58</sup> Moreover, as Spectrum Five indicates, the Bermuda license has not been finalized.<sup>59</sup> Accordingly, Spectrum Five's allegation of an unauthorized transfer of

<sup>50</sup> If EchoStar 6 had remained at its prior location, it would have been one of three satellites at the location, in addition to the Quetzsat-1 satellite providing service from the location. The EchoStar 1 and EchoStar 8 satellites are currently at or near the 77° W.L. orbital location. Thus, the departure of EchoStar 6 as one of three backups to the same satellite has had at most a minimal effect on the public interest benefits that such backup facilities provide.

<sup>51</sup> ESOC Opposition at 3-4. See also *Bureau Decision* at ¶ 12 (noting that granting the STA would permit ESOC to provide service to U.S.-flagged vessels operating beyond the baselines of the various coastal states and possessions).

<sup>52</sup> See *Bureau Stay Decision* at ¶ 18 (concluding that the STA was in the public interest because it facilitated commercial development, potentially leading to greater spectrum use).

<sup>53</sup> *Bureau Stay Decision* at ¶¶ 11-16.

<sup>54</sup> See Letters from Todd M. Stansbury, counsel for Spectrum Five, to Marlene H. Dortch, Secretary, dated June 4, 6, 19, 21, and 25, 2013.

<sup>55</sup> June 4 Letter at 7.

<sup>56</sup> The Commission set forth its standard for reviewing claims of unauthorized transfers of control in *Applications of Intermountain Microwave*, Public Notice, 12 F.C.C. 2d 559 (1963).

<sup>57</sup> *Bureau Decision* at 7.

<sup>58</sup> See EchoStar Opposition to Spectrum Five's Petition to Deny EchoStar's License Modification Request, dated June 13, 2013, File No. SAT-MOD-20130227-00026 at 8-9.

<sup>59</sup> June 4 Letter at 4.



control is both untimely and unfounded.

19. Second, in another new argument, Spectrum Five notes statements by Dr. Gibbons, the Bermuda Minister of Economic Development that the UK Foreign Ministry and Ofcom “made numerous filings” and conducted “a sustained and coordinated lobby effort on Bermuda’s behalf.” Spectrum Five notes that the record does not reflect these communications.<sup>60</sup> *Ex parte* statements involving a “foreign affairs function of the United States” are exempt from the Commission’s *ex parte* rules.<sup>61</sup> Furthermore, the communications received by the Bureau involved ITU coordination, and are treated as confidential and are not routinely available for public inspection under the Commission’s rules.<sup>62</sup> Accordingly, the absence of entries in the publicly available record does not raise an *ex parte* issue.

#### IV. CONCLUSION AND ORDERING CLAUSES

20. Upon review of the Application for Review and the entire record, we conclude that Spectrum Five has failed to demonstrate that the Bureau erred. We uphold the International Bureau’s decision based on the reasoning set forth in this order above.

21. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and Section 1.115(g) of the Commission’s Rules, 47 C.F.R. § 1.115(g), the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>60</sup> June 25 Letter at 2.

<sup>61</sup> See 47 C.F.R. § 1.1204(a)(4).

<sup>62</sup> See 47 C.F.R. § 0.457(d)(1)(vii).